



Date issued: NOVEMBER 20, 1992

Case No.: 90-INA-66

IN THE MATTER OF:

CANADIAN NATIONAL RAILWAY CO.,
Employer,

on behalf of

PERRY GEORGE BARKHOUSE,
Alien

Before: Brenner, Clarke, De Gregorio, Glennon, Groner,¹ Guill, Litt, Romano, and
Williams
Administrative Law Judges

JOEL R. WILLIAMS
Administrative Law Judge

ORDER DENYING RECONSIDERATION

The Board issued an en banc decision on September 11, 1992 granting labor certification in this matter. The Certifying Officer served a Motion for Reconsideration on September 29, 1992, which was filed in this Office on the same date.

The Board has the authority to reconsider its decisions. Edelweiss Manufacturing Co., Inc., 87-INA-562 (Nov. 10, 1988) (en banc decision and order denying motion for reconsideration), slip op. at 3-4. Motions to reconsider, however, must be served within ten days of issuance of the Decision and Order. Lignomat USA, Ltd., 88-INA-276 (Jan. 24, 1990) (order denying motion for reconsideration) (holding that Rule 59(e) of the Federal Rules of Civil Procedure governs the time period for filing motions to reconsider with the Board), slip op. at 2. See also Tel-Ko Electronics, Inc., 88-INA-416 (July 30, 1990) (reconsideration en banc), slip op. at n. 2.; Spearman v. Roadway Express, Inc., 92-STA-1 (Sec'y Oct. 27, 1992) (Order Denying Motion to Reconsider; applying Rule 59(e) in a whistleblower case arising under the Surface Transportation Assistance Act where the neither the Act nor the regulations provided direction on motions to reconsider).

Time computations in proceedings before the Board are generally governed by section 18.4 of the Rules of Practice and Procedure for Administrative Hearings Before the Office of

¹ Judges Glennon and Groner did not participate in consideration of this motion.

Administrative Law Judges, 29 C.F.R. Part 18, unless there is a specific regulation governing labor certification proceedings. See Delmar Family Dental Center, 88-INA-132 (Sept. 26, 1988) (en banc order of dismissal), slip op. at 2. Pursuant to that section, the time period for service of the motion began to run on September 12, 1992. § 18.4(a). Five days are added because the Decision and Order was served by mail. § 18.4(c)(3). Because the final day of the period fell on Saturday, September 26, 1992, the last date on which the motion could have been timely served was Monday, September 28, 1992. § 18.4(a). The Certifying Officer's motion was not served until Tuesday, September 29, 1992. Accordingly, the motion was not timely.

Even if the motion had been filed timely, the decision whether to reconsider would be within the Board's sound discretion. Edelweiss Manufacturing Co., *supra*, slip op. at 4. Denial of such a motion is appropriate where the movant fails to point out a flaw in the judicial process by which the Board reached its decision or that the Board overlooked some important fact. *Id.*

The central holding of the en banc decision in this matter was that union membership and selection based on criteria imposed by a collective bargaining agreement were, in the circumstances of the case, proper qualifications for purposes of 20 C.F.R. § 656.20(c)(8). Canadian National Railway Co., 90-INA-66 (Sept. 11, 1992) (en banc), slip op. at 5. In her Motion for Reconsideration, the Certifying Officer asserts that the Board's decision improperly sanctions closed union shops, and that case law relating to the Railway Labor Act, 45 U.S.C.A. §§ 151-163, 181-185, 186 note, 187, 188 (1992), indicates that union membership is not a job requirement.

In questioning whether approval of the labor certification in this matter is tantamount to approval of closed union shops, the Certifying Officer is, in effect, now asserting that the job opportunity's terms, conditions, and occupational environment are contrary to Federal, State or local law in violation of 20 C.F.R. § 656.20(c)(7). This violation, however, was not raised by the Certifying Officer in the Final Determination or before the Board prior to decision. Similarly, the argument that not all railway employees are considered union members under the Railway Labor Act, and therefore union membership is not a job requirement, was not made prior to decision. Asserted violations² or supporting arguments that could have been raised prior to decision will not be entertained on reconsideration.

² See, e.g., Loew's Anatole Hotel, 89-INA-230 (Apr. 26, 1991) (en banc) (issue not preserved in the Final Determination will not be considered by the Board on review).

ORDER

IT IS ORDERED that the Certifying Officer's Motion for Reconsideration is hereby DENIED.³

At Washington, D.C.

JOEL R. WILLIAMS
Administrative Law Judge

Judge Guill, with whom Judge Litt joins, concurring in part and dissenting in part.

Since the Certifying Officer's motion to reconsider was not timely filed, I would not rule on whether the motion states sufficient grounds for reconsideration of the en banc decision and order. See Tel-Ko Electronics, Inc., 88-INA-416 (July 30, 1990) (decision and order on motion for reconsideration of en banc decision), slip op. at n. 2 (Board "emphasized" that the time limit would be strictly applied in future cases). The Board, however, has gone beyond ruling on the timeliness of the motion, and I cannot concur in part of that additional determination.

In the en banc decision, Canadian National Railway Co., 90-INA-66 (Sept. 11, 1992) (en banc), slip op. at 4, the Board cites Railway Employer's Dept. v. Hanson, 351 U.S. 225 (1956) for the proposition that the Railway Labor Act, 45 U.S.C. § 154, subd. 11, exempts railway union shop agreements from "right to work" provisions in state laws and constitutions. The impact of the Railway Labor Act was not briefed by any party prior to decision, nor was this question raised at the oral argument. The Board, therefore, presented this authority for the first time in its decision. I believe that the Certifying Officer properly may raise in a motion for reconsideration the question of whether the Board misinterpreted a federal statute, and I do not view that aspect of its motion to be an argument that should have been made prior to decision. Specifically, how could the Certifying Officer have predicted that the Board would cite this authority, and in her view, cite it incorrectly?

I express no opinion on whether the authority cited by the Certifying Officer concerning the Railway Labor Act would require a modification or reversal of the en banc decision. I simply note that if this motion had been timely filed, I would have reconsidered this aspect of the Board's decision.

Judge Clarke and Judge Romano, dissenting.

We would grant the motion to reconsider and reverse the en banc decision.

³ In view of the disposition of the CO's motion to reconsider, it is not necessary to rule on Canadian National's motion to fix or extend its time to serve opposing papers.